Supreme Court, U.S.
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No. 96-2

In The

Supreme Court of the United States

October Term, 1995

MCDERMOTT, INC.,

Petitioner,

versus

CAPITAL WELDING AND FABRICATION, INC. AND LANDRY ENTERPRISES, INC. OF MORGAN CITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF CAPITAL WELDING AND FABRICATION, INC. AND LANDRY ENTERPRISES, INC. IN OPPOSITION TO MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Forest Oil Corporation ("Forest"), a stranger to this litigation but no stranger to contractual indemnity disputes in the offshore oil industry, has submitted its arguments in favor of McDermott, Inc.'s Petition for a Writ of Certiorari as a friend of the court. Forest asserts that the contractual obligation to indemnify another for marine risks is a separable maritime obligation in a mixed contract, and even if the remainder of the contract is non-maritime and subject, under OCSLA, to Louisiana law, maritime law should apply to the indemnity obligation.

As a preliminary matter, the issue raised by Forest ("Should maritime law apply to an express agreement to indemnify a maritime risk?", Brief Amicus Curiae, p. 10), is different than McDermott's issue, the applicability and/or preemptive effect of § 905(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., on a non-maritime contract. Forest's brief does not simply introduce new arguments; it introduces a new issue absent from the petitioner's writ application. Accordingly, the amicus brief should not be considered by this Court.

Forest is quite correct that there is in the U.S. Fifth Circuit authority for the notion of a "mixed contract", i.e., a contract containing both maritime and non-maritime obligations. If the contract is maritime, but the injury arises out of the performance of a separable non-maritime obligation, state law governs the indemnity dispute. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988), *reh. denied*, 844 F.2d 788 (5th Cir. 1988). Conversely,

if the injury occurs in the performance of a maritime obligation, in an otherwise non-maritime contract, the indemnity provision is subject to maritime law. For example, a drilling contractor may agree to furnish a supply boat (a maritime obligation) as part of an offshore drilling contract to be performed on a fixed platform (a non-maritime obligation). A supply boat crewmember is injured, and brings suit, alleging unseaworthiness, against the drilling contractor and the platform owner. The platform owner sues the drilling contractor for contractual indemnity and wins, because the injury arose of a separable maritime obligation, the provision of the supply boat, under the contract. This was the scenario in *Hale v. Co-Mar Offshore Construction*, 588 F.Supp. 1212, 1214 (W.D.La. 1984).

However, the mere presence of a maritime obligation in a mixed contract does not infuse the contract with maritime status. The U.S. Fifth Circuit has said, in an opinion which must inform the result in this case, that "It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231 (5th Cir. 1985). Application of admiralty law to contracts relating to offshore mineral exploration is particularly suspect in light of the legislative choices embodied in the OCSLA. *Laredo*, 754 at 1232, citing this Court's opinion in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The defect in Forest's argument is that the underlying claim for which indemnity is demanded did not arise out of a separable maritime obligation under the blanket

service agreement. The primary obligation under the contract at issue was the provision of welders to perform welding on a fixed offshore platform. It was in the performance of this primary and non-maritime obligation that the plaintiff allegedly sustained his injury. The plaintiff claimed he slipped and fell in the washroom on the adjacent barge which served as living quarters. With respect, it is submitted that answering the call of nature, albeit on a vessel, cannot be considered a separable maritime obligation under the McDermott/Capital agreement. Plaintiff was in performance of the principal, non-maritime, obligation under the contract when the subject incident arose.

Forest is in error when it states, "There is no question that maritime law enforces agreements for the indemnity of maritime risks. This conclusion is confirmed by numerous authorities applying maritime law to insurance policies insuring maritime risks." A policy of marine insurance is regarded as a maritime contract. That is why maritime law applies. *New Hampshire Insurance Co. v. Martech USA, Inc.*, 993 F.2d 1195 (5th Cir. 1991). A contract to procure marine insurance is not regarded as a maritime contract, and not subject to maritime law. *Angelina Casualty Company v. Exxon Corporation, U.S.A., Inc.*, 876 F.2d 40 (5th Cir. 1989). Maritime law applies to a contractual indemnity agreement when the injury for which indemnity is demanded occurs in the performance of a maritime contract, or when the injury occurs during the performance of a separable maritime obligation in a mixed contract. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986); *Hollier v. Union Texas Petroleum Corp.*,

972 F.2d 662, 665 (5th Cir. 1992). Neither scenario fairly describes the situation here.

Forest's argument does not overcome application of the OCSLA three-part analysis, nor the resulting application of state law as surrogate federal law under OCSLA. Neither McDermott nor Forest has addressed the issue of OCSLA and its clear directive that the law of the adjacent state be applied to disputes on the Outer Continental Shelf arising from the exploration for offshore oil and gas. In order to find in favor of McDermott (and indirectly in favor of Forest), this Court would have to find that maritime law applies to oilfield contracts on the Outer Continental Shelf when a vessel is fortuitously present and has merely an incidental or no relationship at all with the object of the contract. Such a result would be in direct contravention with the legislative will as expressed in OCSLA, and articulated by this Court in *Rodrigue* – *"the particular policy judgments embodied in the OCSLA preclude in some cases the application of maritime law quite independently of the traditional principles of admiralty"*. *Laredo*, 754 F.2d at 1232. The result for which McDermott and Forest argue here, if it is to be effected, must be brought about by the legislative branch. The law as it

presently stands will not tolerate the application of maritime law to the McDermott/Capital contract. The petition should be denied.

Respectfully submitted,

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